

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Cavanagh, P.J., and Jansen and Fort Hood, JJ.)

JOSIP RADELJAK, Personal Representative,
Estate of ENA BEGOVIC, Deceased;
JOSIP RADELJAK, Individually and as
Next Friend of LANA RADELJAK;
LEO RADELJAK and TEREZA BEGOVIC,

Supreme Court No. 127679

Plaintiffs-Appellees,

Court of Appeals No. 247781

vs.

Wayne Circuit No. 02-228401-NP

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

AMICUS CURIAE BRIEF OF THE MICHIGAN TRIAL LAWYERS ASSOCIATION

DONALD M. FULKERSON (P35785)
Attorney for Amicus Curiae
The Michigan Trial Lawyers Association
P.O. Box 85395
Westland, MI 48185
(734) 467-5620

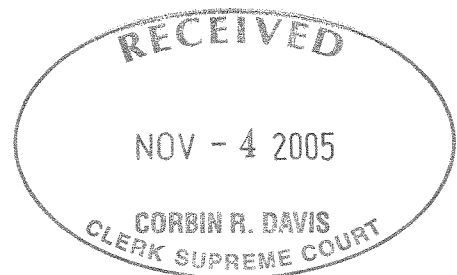


TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES	i
STATEMENT OF QUESTIONS PRESENTED	viii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF FACTS	1
ARGUMENT	1
I. DEFENDANT AND ITS AMICI PRESENT NO EMPIRICAL EVIDENCE JUSTIFYING ALTERATION OF THE DEFERENCE ACCORDED TO A NON-U.S. PLAINTIFF'S CHOICE OF FORUM, MODIFICATION OF <u>CRAY'S</u> PUBLIC INTEREST FACTORS, OR ELIMINATION OF THE "SERIOUSLY INCONVENIENT" STANDARD.....	1
<u>Argument Summary</u>	1
A. <u>Cray has not produced a "floodgate" of lawsuits by foreign plaintiffs and has not inadequately protected defendants and the Michigan court system against attenuated litigation. No commentator has urged modification of Cray or elimination of Michigan's "seriously inconvenient" standard. Not a single case has criticized Cray.</u>	3
B. <u>Michigan law amply protects defendants from "forum shopping," particularly in product liability claims.</u>	7
II. THE MTLA SUPPORTS CLARIFICATION OF <u>CRAY'S</u> PUBLIC INTEREST FACTORS. THE MTLA FURTHER RECOMMENDS THAT THE SUPREME COURT ESTABLISH THAT THE DEFENDANT HAS THE BURDEN OF PROVING ALL THE ELEMENTS FOR A FNC DISMISSAL, INCLUDING THE BURDEN OF ESTABLISHING AN AVAILABLE ALTERNATIVE FORUM THAT PERMITS LITIGATION OF THE MATTER, THAT OFFERS A REMEDY THAT IS NOT CLEARLY UNSATISFACTORY, AND WHERE THE DEFENDANT IS SUBJECT TO JURISDICTION.	9
<u>Argument Summary</u>	9
A. <u>The MTLA supports clarification of the first and third public interest factor.</u>	9

B.	<u>The Court should establish that the defendant has the burden of proving each of the three elements for a FNC dismissal, including that an alternative forum is available – that is, a forum that may exercise jurisdiction over the defendant, that permits litigation of the matter, and provides a remedy that is not clearly unsatisfactory.</u>	11
III.	MICHIGAN SHOULD NOT ADOPT A RULE AFFORDING LESS DEFERENCE TO NON-US PLAINTIFFS’ CHOICE OF FORUM THAN ACCORDED TO US CITIZENS.	12
	<u>Argument Summary</u>	12
A.	<u>As a common law exception to a court’s responsibility to decide cases jurisdictionally before it, FNC must remain a limited doctrine, applicable only in “extraordinary cases.”</u>	13
B.	<u>Michigan should not adopt the ruling in Piper Aircraft Co v Reyno reducing the deference owed to a foreign plaintiff’s choice of forum.</u>	14
1.	Post-Piper decisions have been vague, amorphous and unprincipled.	15
2.	The Piper rule undermines international comity and unfairly protects resident MNCs from liability for tortious conduct.	17
3.	FNC dismissals usually deprive non-US plaintiffs of a remedy.	20
4.	Some states and federal courts have rejected or departed from Piper.	22
C.	<u>If this Court adopts Piper, it should emphasize that a foreign plaintiff’s choice of forum is still accorded some deference and that FNC should apply only in “exceptional cases.”</u>	24

IV.	THE SUPREME COURT SHOULD NOT SIGNIFICANTLY ALTER CRAY'S PUBLIC INTEREST FACTORS AND SHOULD NOT INCLUDE CONSIDERATION OF THE EXTENT TO WHICH ACCOMMODATING THE INSTANT LAWSUIT WILL HAVE CONSEQUENCES FOR THE NUMBERS AND TYPES OF FUTURE LAWSUITS HEARD BY MICHIGAN COURTS.	26
	<u>Argument Summary</u>	
A.	<u>Significant modification of the public interest factors is unnecessary.</u>	26
B.	<u>Adoption of additional public factors, including a factor requiring a trial court judge to predict the possible impact the present claim may have on the number and type of future Michigan cases, will likely spawn arbitrary, inconsistent and unfair rulings.</u>	26
V.	THE COURT SHOULD NOT ADOPT A "CATEGORICAL RULE" FAVORING OR REQUIRING FNC DISMISSALS IN CASES LIKE THIS. IF ANYTHING, FNC SHOULD PRESUMPTIVELY BE DENIED WHERE A DEFENDANT MNC RESIDES IN MICHIGAN, WHERE THE ALLEGED TORITOUS CONDUCT OCCURRED IN THIS STATE, AND WHERE LIABILITY WITNESSES ARE LOCATED HERE.	29
	<u>Argument Summary</u>	29
VI.	"SERIOUSLY INCONVENIENT" IS THE CORRECT STANDARD, FIRMLY ROOTED IN BOTH MICHIGAN AND NATIONAL LAW. . .	31
	<u>Argument Summary</u>	31
A.	<u>It is national, Restatement law that a state will decline to exercise jurisdiction only if it is "seriously inconvenient."</u>	31
B.	<u>The "seriously inconvenient" rule is also consistent with doctrines relating to enforcement of both forum selection clauses and judgments.</u>	33
	RELIEF REQUESTED	35

INDEX OF AUTHORITIES

Page(s)

Michigan Cases Cited

<u>Anderson v Great Lakes Dredge & Dock Co</u> , 411 Mich 619; 309 NW2d 539 (1981)	4,11,13,29
<u>Beall v Ernst & Young, LLP</u> , (unpl COA No. 192874; 1997 WL 33353682; 2/25/97)	4
<u>Bellin v Johns-Manville Sales Corp.</u> , 141 Mich App 128; 366 NW2d 20 (1984) . .	4
<u>Bradbury v TRW Vehicle Safety Systems</u> , (unpl COA No. 202115; 1998 WL 1988674; 12/8/98)	4
<u>Catchings v Ford Motor Co</u> , (unpl COA No. 173501; 1996 WL 33349434; 10/11/96)	4
<u>Cooper Tire & Rubber Co v Moore</u> , (unpl COA No. 230166; 2001 WL 672592; 4/27/01)	4
<u>Cray v General Motors Corp.</u> , 389 Mich 382; 207 NW2d 393 (1973)	passim
<u>Dayton Mall Motor Inn v Honeywell, Inc.</u> , 132 Mich App 174; 347 NW2d 15 (1984)	4
<u>Duyck v Int'l Playtex, Inc.</u> , 144 Mich App 595; 375 NW2d 769 (1985)	4,29,30
<u>Espariso Components Para Veitulos Ltda v Woodbridge</u> , (unpl COA No. 234712; 2002 WL 31954000; 12/13/02)	3,5
<u>Federal Ins Co v Armarda Corp.</u> , (unpl COA No. 245390; 2004 WL 1486050; 7/1/04)	3
<u>Frankenmuth Mutual Ins Co v Keeley</u> , 433 Mich 525; 447 NW2d 691 (1989) . . .	7
<u>Garg v Macomb County Community Mental Health Services</u> , 472 Mich 263; 696 NW2d 646 (2005)	15
<u>George v 1078385 Ontario Ltd</u> , (unpl COA No. 232633; 2002 WL 31953992; 12/13/02)	3
<u>Hacienda Mexican Restaurants of Kalamazoo Corp v Hacienda Franchise Group, Inc.</u> , 195 Mich App 35; 489 NW2d 108 (1992)	4

<u>Hamman v American Motors Corp</u> , 131 Mich App 605; 345 NW2d 699 (1983) . . .	4
<u>Hartford Fire Ins Co v Walter Kidde & Co, Inc</u> , 120 Mich App 283; 328 NW2d 29 (1982)	7
<u>Holme v Jason's Lounge</u> , 168 Mich App 132; 423 NW2d 585 (1988)	4
<u>Huston Produce, Inc v Fedak</u> , 451 Mich 881 (1995)	4
<u>Jemaa v MacGregor Athletic Products</u> , 151 Mich App 273; 390 NW2d 180 (1986)	4
<u>Jones v W + M Automation</u> , (unpl COA No. 219813; 2002 WL 393656; 3/8/02) . .	
<u>Kaiser v North</u> , 292 Mich 49; 289 NW2d 325 (1939)	10
<u>Kewin v Massachusetts Mutual Life Ins. Co</u> , 409 Mich 401; 295 NW2d 50 (1980)	7
<u>Kirk v Ford Motor Co</u> , 147 Mich App 337; 383 NW2d 193 (1985)	8
<u>Kornmeien v Great Lakes Towing</u> , (unpl COA No. 241113; 2003 WL 22872136; 12/4/03)	3
<u>Lamb v Haden Schweitzer Corp</u> , (unpl COA No. 179871; 1996 WL 33364554; 5/17/96)	4
<u>Manfredi v Johnson Controls, Inc</u> , 194 Mich App 519; 487 NW2d 475 (1992) . . .	4,11,33
<u>McLarty v Kubota Tractor, Ltd</u> , 173 Mich App 82; 433 NW2d 344 (1980)	4
<u>Miller v Allied Signal, Inc</u> , 235 Mich App 710; 599 NW2d 110 (1999)	4
<u>Olmstead v Anderson</u> , 428 Mich 1; 400 NW2d 292 (1987)	10
<u>Owens v Allis-Chalmers Corp</u> , 414 Mich 413; 326 NW2d 372 (1982)	8
<u>Prentis v Yale Manufacturing Co</u> , 421 Mich 670; 365 NW2d 176 (1984)	8
<u>Present v Volkswagen of America, Inc</u> , 462 Mich 908 (2000)	4,6,28
<u>Radeljak v DaimlerChrysler Corp</u> , (unpl COA No. 247781; 2004 WL 2873816; 12/14/04)	4
<u>Robey v Ford Motor Co</u> , 155 Mich App 643; 400 NW2d 610 (1986)	4,11,33
<u>Russell v Chrysler Corp</u> , 43 Mich 617; 505 NW2d 263 (1993)	4,5,29

<u>SBL Orange Park Investments, Ltd v RMED, Inc</u> , (unpl COA No. 253233; 2005 WL 1812750; 8/2/05)	3
<u>Valassis Communications, Inc v American Home Assurance</u> , (unpl COA No. 185586; 1997 WL 33345035; 6/3/97)	4
<u>Whitbeck v Bill Cody's Ranch Inn</u> , 147 Mich App 587; 383 NW2d 253 (1985)	4
<u>Witt v CJ Barrymore's</u> , 195 Mich App 517; 491 NW2d 871 (1992)	4,29,30
<u>Zidar v Fleet Transp Co, Inc</u> , (unpl COA No. 225290; 2001 WL 1422143; 11/13/01)	3-4

Federal Cases Cited

<u>Aguinda v Texaco, Inc</u> , 303 F3d 470 (2d Cir 2002)	11
<u>Alcoa Steamship Co, Inc v M/V Nordic Regent (On Recon)</u> , 654 F2d 147 (2nd Cir 1980)	6
<u>BCCI v State Bank of Pakistan</u> , 273 F3d 241 (2d Cir 2000)	12
<u>Bremen v Zapata Off-Shore Co</u> , 407 US 1; 92 S Ct 1907; 32 L Ed 2d 513 (1972) .	33
<u>Capri Trading Corp v Bank Bumiputra Malaysia Berhad</u> , 812 F Supp 1041 (ND Cal 1993)	27
<u>Coastal Steel Corp v Tilghman Wheelbrator Ltd</u> , 709 F2d 190 (3d Cir 1983)	33-34
<u>Cohens v Virginia</u> , 19 US (6 Wheat) 264 (1821)	14
<u>Cromer Fin Ltd v Berger</u> , 158 F Supp 2d 347 (SD NY 2001)	25
<u>Ford v Brown</u> , 319 F3d 1302 (11th Cir 2003)	11
<u>Gschwind v Cessna Aircraft Co</u> ; 161 F.3d 602 (10 th Cir 1998)	25
<u>Gulf Oil Corp v Gilbert</u> , 330 US 501; 67 S Ct 839; 91 L Ed 2d 1055 (1947)	passim
<u>In re Ford Motor Co</u> , 344 F3d 648 (7 th Cir 2003)	11
<u>In re Seatrain Lines, Inc</u> , 32 BR 669 (Bkrtcy NY 1983)	27
<u>Iragorri v United Techs Corp</u> , 274 F3d 65 (2d Cir.2001) (<i>en banc</i>)	11
<u>Koster v Lumbermens Mutual Casualty Co</u> , 330 US 518; 67 S Ct 828; 91 L Ed 1067 (1947)	16,22

<u>La Seguridad v Transytur Line</u> , 707 F2d 1304 (11 th Cir 1983)	27
<u>Loannidis/Riga v M/V Sea Concert</u> , 132 F Supp 2d 847 (D Or 2001)	32
<u>Lony v E.I. Du Pont de Nemours & Co</u> , 935 F2d 604 (3 rd Cir 1991)	17,24,25,30
<u>Lueck v Sundstrand Corp</u> , 236 F3d 1137 (9 th Cir 2001)	25
<u>Manu Intern'l, SA v Avon Products, Inc</u> , 641 F2d 62 (2 nd Cir 1981)	6
<u>Murray v BBC</u> , 81 F3d 287, 290 (2d Cir 1996)	25
<u>Nemariam v Federal Democratic Republic of Ethiopia</u> , 315 F3d 390 (DC Cir 2003)	27
<u>Nieminen v Breeze-Eastern</u> , 736 F Supp 580 (D NJ 1990)	17,24,25,30
<u>Pain v United Technologies Corp</u> , 637 F2d 775 (DC Cir 1980)	27
<u>Piper Aircraft Co v Reyno</u> , 454 US 235; 102 S Ct 252; 70 L Ed 2d 419 (1981) . .	passim
<u>Ravelo Monegro v Rosa</u> , 211 F3d 509 (9 th Cir 2000)	25
<u>Reavis v Gulf Oil Corp</u> , 85 FRD 666 (DC Del 1980)	14
<u>Satz v McDonnell Douglas Corp</u> , 244 F3d 1279 (11 th Cir 2001)	12
<u>Security Watch, Inc v Sentinel Systems, Inc</u> , 176 F3d 369 (6 th Cir 1999)	34
<u>Slight By and Through Slight v E.I. DuPont De Nemours & Co</u> , 979 F Supp 433 (SD W Va 1997)	25
<u>Southern Pacific Co v Jensen</u> , 244 US 205; 37 S Ct 524; 61 L Ed 1086 (1917)	16
<u>Warn v M/V Maridome</u> , 961 F Supp 1357 (SD Cal 1997)	32
<u>Wimmer Canada, Inc v Abele Tractor & Equipment Co, Inc</u> , 750 NYS2d 331 (NY Super 2002)	34
<u>Yamada Corp v Yasuda Fire and Marine Ins Co, Ltd</u> , 712 NE2d 926 (Ill App 1999) .	34
<u>Non-Michigan State Court Cases Cited</u>	
<u>Alley v Parker</u> , 707 A2d 77 (Me 1998)	33
<u>Ameritas Inv Corp v McKinney</u> , 694 NW2d 191 (Neb 2005)	32
<u>Anglim v Missouri Pacific RR Co</u> , 832 SW2d 298 (Mo banc 1992)	33

<u>Baypack Fisheries, LLC v Nelbro Packing Co</u> , 992 P2d 1116 (Alaska 1999)	32
<u>Betensky v Opcon Associates, Inc.</u> , 738 A2d 1171 (Conn Super 1999)	32
<u>Blake v Professional Travel Corp</u> , 768 A2d 568 (DC 2001)	32
<u>Carter v Netherton</u> , 302 SW2d 382 (Ky 1957)	33
<u>Chambers v Merrell-Dow Pharmaceuticals, Inc.</u> , 519 NE2d 370 (Ohio 1988)	33
<u>Corrigan v Bjork Shiley Corp</u> , 227 Cal Rptr 247 (Cal App 1986)	30
<u>Dow Chemical Co v Castro Alfaro</u> , 786 SW2d 684 (Tex 1990)	19,20,23
<u>Durkin v Intevac, Inc.</u> , 782 A2d 103 (Conn 2001)	24
<u>Ison v E.I. Du Pont de Nemours & Co, Inc.</u> , 729 A2d 832 (Del 1999)	24
<u>Johnson v GD Searle & Co</u> , 552 A2d 29 (Md 1989)	33
<u>Kinney System, Inc v Continental Ins Co</u> , 674 So2d 86 (Fla 1996)	27
<u>Lesser v Boughey</u> , 965 P2d 802 (Hawaii 1998)	34
<u>MacLeod v MacLeod</u> , 383 A2d 39 (Me 1978)	6
<u>Medlantic Long Term Care Corp v Smith ex rel Estate of Ferguson</u> , 791 A2d 25 (DC 2002)	32
<u>Missouri Pacific RR Co v Tircuit</u> , 554 So2d 878 (Miss 1989)	33
<u>Myers v Boeing Co</u> , 794 P2d 1272 (Wash 1990)	18,22,23
<u>Nevader v Deyo</u> , 489 NYS2d 420 (NY AD 1985)	30
<u>Pickets v Int'l Playtex, Inc.</u> , 576 A2d 518 (Conn 1990)	23
<u>Stangvik v Shiley, Inc.</u> , 819 P2d 14 (Cal 1991)	30
<u>Statutes Cited</u>	
MCL 600.745(3)(c)	33
MCL 600.2946(2)	8
MCL 600.2946(4)	8

MCL 600.2946(5)	8
MCL 600.2947	7
MCL 691.1154(1)(f)	34
VTCA, Civil Practice & Remedies Code § 71.051	19
<u>Law Review Articles Cited</u>	
<u>Annual Survey</u> , 41 Wayne L Rev 379, 393-394 (Winter 1995)	5
Boyce, <u>Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno</u> , 64 Tex L Rev 193 (1985)	18
Carney, <u>International Forum Non Conveniens: § 1404.5 – A Proposal in the Interest of Sovereign Comity and Individual Justice</u> , 45 Am U L Rev 415 (Dec 1995)	17,19,20,25,30
Clagett, <u>Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of US Courts to Foreign Plaintiffs</u> , 9 Tul Envtl L J 513 (Summer 1996)	15,20
Higer and Siskind, <u>Florida Provides Safe Haven for Forum Shoppers</u> , 69 Fla B J 20 (Oct 1995)	5
Ismail, <u>Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?</u> , 11 BC Third World L J 249 (1990)	18
Juenger, <u>Forum Shopping, Domestic and International</u> , 63 Tul L Rev 553 (Feb 1989)	5
Karayanni, <u>The Myth and Reality of a Controversy: “Public Factors” and the Forum Non Conveniens Doctrine</u> , 21 Wis Int’l L J 327 (Spring 2003)	27,33
Lowenfeld, <u>Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation</u> , 91 Am. J. Int’l L. 314 (1997) ..	7
Mardirosian, <u>Developments in the Law: Federal Jurisdiction and Forum Selection, Part VII Forum Non Conveniens</u> , 37 Loy LA L Rev 1643 (Summer 2004)	16,21
Pfander, <u>Adding Insult to Overseas Injury: A failure of the Forum Non Doctrine</u> , 93 Ill B J 314 (June 2005)	21

Reed, <u>To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Stages</u> , 29 Ga J Int'l & Comp L 31 (2000)	16
Robertson, <u>Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"</u> 103 L Q Rev 398 (1987)	21
Robertson and Speck, <u>Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions</u> , 68 Tex L Rev 937 (April 1990)	5,13
Stein, <u>Forum Non Conveniens and the Redundancy of Court-Access Doctrine</u> , 133 U Pa L Rev 781 (1985)	17
Van Detta, <u>The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Exemplified by Forum Non Conveniens Dismissals in International Product Liability Injury Cases</u> , 87 Marq L Rev 425 (Spring 2004)	17,18,20
Waples, <u>The Adequate Alternate Forum Analysis in Forum Non Conveniens: A Case for Reform</u> , 36 Conn L Rev 1475 (Summer 2004)	16,17,18,20
Wilson, <u>Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation</u> , 65 Ohio St L J 659 (2004) .	18,19

Other Authorities Cited

<u>Lubbe v Cape PLC</u> , 4 All E R 268 (HL 2000)	27
Restatement 2d Conflict of Laws. § 84	31

STATEMENT OF QUESTIONS PRESENTED

- I. Whether Defendant and its amici present no empirical evidence justifying alteration of the deference accorded to a non-US Plaintiff's choice of forum, modification of Cray's public interest factors, or elimination of the "seriously inconvenient" standard.**

Plaintiffs-Appellees state: Yes.

Defendant-Appellant states: No.

The trial court did not address this question.

The Court of Appeals did not address this question.

- II. Whether Cray's public interest factors should be clarified; and whether the Supreme Court should establish that the Defendant has the burden of proving all the elements for a FNC dismissal, including the burden of establishing an available alternative forum that permits litigation of the matter, that offers a remedy that is not clearly unsatisfactory, and where the defendant is subject to jurisdiction.**

Plaintiffs-Appellees state: Yes.

Defendant-Appellant apparently states: Yes.

The trial court did not address this question.

The Court of Appeals did not address this question.

- III. Whether Michigan should not adopt a rule according less deference to a non-US plaintiff's choice of form than afforded to US citizens.**

Plaintiffs-Appellees state: Yes.

Defendant-Appellant states: No.

The trial court did not address this question.

The Court of Appeals did not address this question.

- IV. Whether the Supreme Court should not significantly alter Cray's public interest factors and should not include consideration of the extent to which accommodating the instant lawsuit will have consequences for the numbers and types of future lawsuits heard by Michigan courts.**

Plaintiffs-Appellees state: Yes.

Defendant-Appellant states: No.

The trial court did not address this question.

The Court of Appeals did not address this question.

- V. Whether the Court should not adopt a “categorical rule” favoring or requiring FNC dismissals in cases like this; and whether, if anything, FNC should presumptively be denied where a defendant multinational corporation resides in Michigan, where the alleged tortious conduct occurred in this state, and where liability witnesses are located here.**

Plaintiffs-Appellees state: Yes.

Defendant-Appellant states: No.

The trial court did not address this question.

The Court of Appeals did not address this question.

- VI. Whether “seriously inconvenient” is the correct standard, firmly rooted in both Michigan and national law.**

Plaintiffs-Appellees state: Yes.

Defendant-Appellant states: No.

The trial court did not address this question.

The Court of Appeals did not address this question.

INTEREST OF AMICUS CURIAE

The Michigan Trial Lawyers Association (MTLA) is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 2,000 attorneys, the Michigan Trial Lawyers Association recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state.

In its June 10, 2005 order granting leave, the Court invited certain organizations, including the MTLA, “to file briefs amicus curiae.” (6/10/05 order). At the Court’s invitation, the MTLA now does so.

STATEMENT OF FACTS

The MTLA adopts the Plaintiffs-Appellees’ (Plaintiffs) statement of facts.

ARGUMENT

- I. **DEFENDANT AND ITS AMICI PRESENT NO EMPIRICAL EVIDENCE JUSTIFYING ALTERATION OF THE DEFERENCE ACCORDED TO A NON-U.S. PLAINTIFF’S CHOICE OF FORUM, MODIFICATION OF CRAY’S PUBLIC INTEREST FACTORS, OR ELIMINATION OF THE “SERIOUSLY INCONVENIENT” STANDARD.**

Argument Summary

According to Defendant-Appellant (Defendant) and its amici, the barbarians are at the gate. They argue that Michigan’s forum non conveniens (FNC) doctrine must be substantially toughened or this state will become the “courthouse to the world.” (Defendant’s brief, p 4; Michigan Manufacturers Association (MMA) brief, p 1). They ask this Court to eliminate the deference owed to a non-U.S. plaintiff’s choice of forum, substantively modify the public factors in Cray,¹ and abolish the rule against FNC dismissals unless Michigan is a “seriously inconvenient” forum. They also request the

¹ Cray v General Motors Corp, 389 Mich 382; 207 NW2d 393 (1973).

Court to adopt a “categorical rule” favoring dismissal of all cases brought by “foreign plaintiffs” – even against a resident Michigan multinational corporation (MNC) for negligence that allegedly occurred in this state. (Defendant’s brief, p 18).

Defendant prophesizes that, unless its recommendations are adopted, a “crushing burden” of international cases with no substantial connection to Michigan will inundate our courts. (Id, p 1). The Michigan Defense Trial Counsel (MDTC) repeatedly urge this Court to protect Michigan, particularly its resident MNCs like Defendant, against “forum shopping” by foreigners.

In all their self-serving hyperbole and doom-saying, Defendant and its amici fail to present a shred of empirical support for their proposition that Cray and Michigan’s FNC doctrine, as currently framed, strikes the wrong balance and inadequately protects Michigan’s judicial system and its resources. Before the Supreme Court considers substantially altering the FNC doctrine, several functional truths must be acknowledged.

Although Cray has been on the books for over thirty years, no “floodgate” of international litigation has congested our trial courts. Indeed, since Cray, only about thirty appellate cases have addressed the granting or denial of FNC motions. Of these, the overwhelming majority ruled in defendants’ favor and upheld or ordered FNC dismissals. In turn, not a single national case has criticized Cray. No commentator has urged any change in the Cray factors or in Michigan’s “seriously inconvenient” standard.

Defendant and its amici’s cries of “forum shopping” are not only unsubstantiated, but spurious. If anything, Michigan law, especially in product liability, over-protects defendants from forum shopping.

Quite clearly, Michigan’s FNC doctrine is not broken. It does not need to be fixed.

A. Cray has not produced a “floodgate” of lawsuits by foreign plaintiffs and has not inadequately protected defendants and the Michigan court system against attenuated litigation. No commentator has urged modification of Cray or elimination of Michigan’s “seriously inconvenient” standard. Not a single case has criticized Cray.

None of Defendant and its amici’s policy rationalizations for substantial modification of Michigan’s FNC doctrine are valid. Defendant’s prediction that failure to revise Cray and eliminate the “seriously inconvenient” standard will bring a “floodgate” of litigation by foreign plaintiffs is spurious.

Cray has been on the books for 32 years. In that time, no progressive increase in case filings by either non-Michigan U.S. citizens or international residents has occurred. Defendant, MMA and MDTC have not presented a shred of empirical evidence that non-residents or non-Americans are filing more lawsuits in Michigan.

Indeed, since this Court decided Cray, there have only been approximately 30 appellate decisions addressing the FNC doctrine. Of the cases reviewing trial court orders granting or denying FNC dismissals, the vast majority have ruled in favor of defendants. Twenty post-Cray decisions have either affirmed FNC dismissals or reversed orders denying FNC dismissals. They are, in reverse chronological order:

SBL Orange Park Investments, Ltd v RMED, Inc, (unpl COA No. 253233; 2005 WL 1812750; 8/2/05) (FNC dismissal affirmed);² Federal Ins Co v Armarda Corp, (unpl COA No. 245390; 2004 WL 1486050; 7/1/04) (same); Kornmeien v Great Lakes Towing, (unpl COA No. 241113; 2003 WL 22872136; 12/4/03) (same); George v 1078385 Ontario Ltd, (unpl COA No. 232633; 2002 WL 31953992; 12/13/02) (same); Espariso Components Para Veitulos Ltda v Woodbridge, (unpl COA No. 234712; 2002 WL 31954000; 12/13/02) (FNC dismissal affirmed, plaintiff Brazilian resident); Zidar v Fleet Transp Co, Inc, (unpl COA No. 225290; 2001 WL

² MTLA cites unpublished opinions to illustrate the history of how Michigan’s appellate courts have applied the Cray factors – not for any specific factual argument. Given this, the number of unpublished cases cited, and the MTLA’s role as amicus, the MTLA does not attach them to this amicus brief.

1422143; 11/13/01) (FNC dismissal affirmed); Cooper Tire & Rubber Co v Moore, (unpl COA No. 230166; 2001 WL 672592; 4/27/01) (FNC dismissal affirmed); Bradbury v TRW Vehicle Safety Systems, (unpl COA No. 202115; 1998 WL 1988674; 12/8/98) (FNC dismissal affirmed); Valassis Communications, Inc v American Home Assurance, (unpl COA No. 185586; 1997 WL 33345035; 6/3/97) (same); Beall v Ernst & Young, LLP, (unpl COA No. 192874; 1997 WL 33353682; 2/25/97) (same); Catchings v Ford Motor Co, (unpl COA No. 173501; 1996 WL 33349434; 10/11/96) (same); Lamb v Haden Schweitzer Corp, (unpl COA No. 179871; 1996 WL 33364554; 5/17/96) (same); Russell v Chrysler Corp, 43 Mich 617; 505 NW2d 263 (1993) (reversing COA holding that FNC inapplicable to resident defendant corporation and overruling Duyck v Int'l Playtex, Inc., 144 Mich App 595; 375 NW2d 769 (1985) and Witt v CJ Barrymore's, 195 Mich App 517; 491 NW2d 871 (1992)); Hacienda Mexican Restaurants of Kalamazoo Corp v Hacienda Franchise Group, Inc, 195 Mich App 35; 489 NW2d 108 (1992) (affirming FNC dismissal); McLarty v Kubota Tractor, Ltd, 173 Mich App 82; 433 NW2d 344 (1980) (order denying FNC dismissal reversed and remanded for proper consideration of Cray factors); Holme v Jason's Lounge, 168 Mich App 132; 423 NW2d 585 (1988) (affirming FNC dismissal); Jemaa v MacGregor Athletic Products, 151 Mich App 273; 390 NW2d 180 (1986) (same); Bellin v Johns-Manville Sales Corp, 141 Mich App 128; 366 NW2d 20 (1984) (same); Hamman v American Motors Corp, 131 Mich App 605; 345 NW2d 699 (1983) (same); Anderson v Great Lakes Dredge & Dock Co, 411 Mich 619; 309 NW2d 539 (1981) (reversing denial of motion to dismiss under FNC).

In turn, only six, non-overruled decisions have held that the Cray factors do not support

a FNC dismissal:

Radeljak v DaimlerChrysler Corp, (unpl COA No. 247781; 2004 WL 2873816; 12/14/04) (reversing FNC dismissal in the case at bar); Present v Volkswagen of America, Inc, 462 Mich 908 (2000) (denying leave to appeal from Court of Appeals FNC remand order); Huston Produce, Inc v Fedak, 451 Mich 881 (1995) (FNC dismissal reversed); Manfredi v Johnson Controls, Inc, 194 Mich App 519; 487 NW2d 475 (1992) (same); Robey v Ford Motor Co, 155 Mich App 643; 400 NW2d 610 (1986) (same); Whitbeck v Bill Cody's Ranch Inn, 147 Mich App 587; 383 NW2d 253 (1985) (affirming denial of FNC dismissal).³

³ This list does not include Witt, supra and Duyck, supra, which were overruled in Russell. It also does not include Jones v W + M Automation, (unpl COA No. 219813; 2002 WL 393656; 3/8/02) and Miller v Allied Signal, Inc, 235 Mich App 710; 599 NW2d 110 (1999), where FNC dismissals were reversed for lack of an alternative forum and Dayton Mall Motor Inn v Honeywell, Inc, 132 Mich App 174; 347 NW2d 15 (1984), where the Court of Appeals held that a motion to dismiss under FNC was untimely.

This breakdown of post-Cray FNC decisions demonstrates that foreign plaintiffs are not filing a “flood” of Michigan cases. Of all the Michigan FNC appellate cases over the past 32 years, only two involved non-U.S. plaintiffs – Espariso Components, *supra*, and the case at bar. In one, Espariso Components, the Court of Appeals affirmed a FNC dismissal. In the other, the case at bar, the Court reversed a FNC dismissal. This reality discredits Defendant and its amici’s warning that, absent substantial modifications of the FNC doctrine, Michigan will become “the courthouse of the world.”

The case breakdown also rebuts any contention that the presumption favoring the plaintiff’s choice of forum, Cray factors or “seriously inconvenient” standard are insufficiently stringent to protect defendants or Michigan’s judicial resources. More than three times the cases applying Cray’s private and public interest factors (20 to 6) have upheld or ordered FNC dismissals. Michigan’s FNC doctrine does not need to be revised.

No commentators or out of state decisions have urged modification of Michigan’s FNC doctrine. Commentators have uniformly cited Cray for illustrative purposes, not as criticism and not to urge any change in Michigan law. See, e.g., Higer and Siskind, Florida Provides Safe Haven for Forum Shoppers, 69 Fla B J 20, 23 n 17 (Oct 1995) (citing Cray as example of state FNC doctrine); Annual Survey, 41 Wayne L Rev 379, 393-394 (Winter 1995) (asserting that Russell reaffirmed Cray); Robertson and Speck, Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions, 68 Tex L Rev 937, 950 n 74 (April 1990) (including Cray in survey of states with FNC doctrine analogous to federal system); Juenger, Forum Shopping, Domestic and International, 63 Tul L Rev 553, 563 n 82 (Feb 1989) (citing Cray as example where domestic corporation moved for FNC dismissal, or “reverse

forum shopping”). Similarly, out of state cases citing Cray have done so uncritically. See, e.g., Manu Intern’l, SA v Avon Products, Inc, 641 F2d 62, 67 (2nd Cir 1981) (favorably citing Cray); Alcoa Steamship Co, Inc v M/V Nordic Regent (On Recon), 654 F2d 147, 157 (2nd Cir 1980) (favorably citing Cray’s rule that party residence is not dispositive as an example of liberal construction of the FNC doctrine); MacLeod v MacLeod, 383 A2d 39, (Me 1978) (favorably citing Cray’s rule that the plaintiff’s choice of forum should not be disturbed unless the balance for dismissal is strongly in favor of the defendant); see also Plaintiffs’ brief, p 33 n 16.

To the MTLA’s knowledge, before this Court’s June 10, 2005 order in this case, the only decision or publication to even imply modification of Cray is Justice Markman’s concurrence in denial of leave in Present v Volkswagen of America, Inc, 462 Mich 908 (2000). His concurrence stated that “it would be useful for the trial court to reflect upon the specific interests of Michigan in resolving this lawsuit, the authority and limits of Cray, and the extent to which accommodating the instant lawsuit in Michigan will have consequences for the numbers and types of future lawsuits heard by Michigan courts.” Id.

The Present concurrence did not cite any authority supporting its suggestion that a trial court consider the potential number and type of future lawsuits in ruling on a FNC motion. The legal genesis of the concurrence is unknown.

As explained below, the MTLA does not believe it is wise to interject prediction of future case statistics into Cray’s public factors. At this point, the MTLA has demonstrated that the history of cases applying Cray does not threaten any significant increase in international case filings. This is true, in part, because Cray does not favor

non-resident or non-U.S. plaintiffs. This is also true because Michigan is not an attractive forum shopping destination.

B. Michigan law amply protects defendants from “forum shopping,” particularly in product liability claims.

Defendant’s contention that its proposed changes to our FNC doctrine are necessary to protect Michigan corporations from “forum shopping” by international plaintiffs is totally misplaced. To the extent that non-U.S. plaintiffs have been motivated by forum shopping, they have been principally drawn to jurisdictions that follow strict liability and permit recovery of punitive damages. Piper Aircraft v Reyno, 454 US 235, 252 n 18; 102 S Ct 252; 70 L Ed 2d 419 (1981) (recognizing states offering strict liability encourage forum shopping); Lowenfeld, Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation, 91 Am. J. Int’l L. 314, 321 (1997) (recovery of punitive damages one of principal attractions for foreign litigants).

Michigan law limits a plaintiff to recovery of compensatory damages only. Punitive damages are prohibited. Frankenmuth Mutual Ins Co v Keeley, 433 Mich 525, 559; 447 NW2d 691 (1989). This alone substantially deters forum shopping.

In potential international cases, such as commercial transactions or product liability, Michigan further limits the category of recoverable damages. In the contractual and commercial context, Michigan does not recognize “bad faith” claims and precludes recovery of noneconomic damages. Kewin v Massachusetts Mutual Life Ins. Co, 409 Mich 401, 419, 423; 295 NW2d 50 (1980).

In product liability claims, such as the case at bar, Michigan does not recognize strict liability. Hartford Fire Ins Co v Walter Kidde & Co, Inc, 120 Mich App 283, 291; 328 NW2d 29 (1982). Instead, plaintiffs must prove that a manufacturer or seller was actually negligent or made an express warranty. MCL 600.2947. Even more, under

Owens v Allis-Chalmers Corp, 414 Mich 413, 429-431; 326 NW2d 372 (1982), Prentis v Yale Manufacturing Co, 421 Mich 670; 365 NW2d 176 (1984) and MCL 600.2946(2), plaintiffs alleging design defect claims must present expert testimony proving that a reasonable alternative design was available, feasible, would not have interfered with the utility of the product, was cost efficient, and was necessary based on a risk-utility analysis of the magnitude of the risk and foreseeability/magnitude of the type of harm the plaintiff suffered.

Added to this stringent burden of proof, MCL 600.2946(5) has essentially eliminated product liability claims against drug manufacturers. In all other product liability cases, MCL 600.2946(4) imposes a rebuttable presumption of non-liability if a product complies with a governmental standard.

Though development of an actionable product liability claim under Michigan law is quite costly, in virtually all product liability cases, MCL 600.2946a substantially caps recoverable damages. Further, in addition to punitive damages, exemplary damages are not recoverable. See Kirk v Ford Motor Co, 147 Mich App 337, 348; 383 NW2d 193 (1985).

Non-U.S. plaintiffs would clearly not “forum shop” in Michigan. They would file suit here only if Michigan had a tangible and necessary connection with the case. Otherwise, they would pick a state that recognized strict liability, allowed punitive damages and did not cap recoveries. The Defendant and its amici’s argument that Michigan’s FNC doctrine must be modified to prevent foreigners from forum shopping in Michigan is not only unsupported, but misplaced.

- II. THE MTLA SUPPORTS CLARIFICATION OF CRAY'S PUBLIC INTEREST FACTORS. THE MTLA FURTHER RECOMMENDS THAT THE SUPREME COURT ESTABLISH THAT THE DEFENDANT HAS THE BURDEN OF PROVING ALL THE ELEMENTS FOR A FNC DISMISSAL, INCLUDING THE BURDEN OF ESTABLISHING AN AVAILABLE ALTERNATIVE FORUM THAT PERMITS LITIGATION OF THE MATTER, THAT OFFERS A REMEDY THAT IS NOT CLEARLY UNSATISFACTORY, AND WHERE THE DEFENDANT IS SUBJECT TO JURISDICTION.

Argument Summary

While empirical evidence raises no reasons to alter Cray's factors or Michigan's FNC doctrine, the MTLA supports the benign clarifications to the public interest factors discussed in Plaintiff's brief. The MTLA also recommends the Supreme Court reiterate that the defendant has the burden of proving each of the three prerequisites for a FNC dismissal, including that an alternative forum is available. Defendant and its amici's stated definition of an available alternative forum is incomplete. An alternative forum is available not simply if the defendant is "amendable to process." The alternative forum must also permit litigation of the matter and provide a remedy that is not clearly unsatisfactory.

A. **The MTLA supports clarification of the first and third public interest factor.**

Of the three Cray public interest factors,

- a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
- b. Consideration of the state law which must govern the case; and
- c. People who are concerned by the proceeding; Cray, 389 Mich at 396,

Plaintiffs suggest that the first and third may be clarified. (Plaintiffs' brief, pp 34-35).

They note that the terms "area" and "area of origin" in the first factor are undefined.

“Area” could be clarified to mean “forum.” “Area of origin” can be defined to mean the jurisdiction where the injury or breach of contract occurred.

Plaintiffs also note that the third factor is ambiguous. In using the word “people,” Cray apparently intended consideration of more than the interest of the litigants. This seems to contemplate a comparison between Michigan and the other potential forum’s interest in the controversy.

Michigan’s current choice of law doctrine combines factors b and c. At the time Cray was decided, Michigan followed the antiquated *lex loci delicti* rule, providing that the place of the accident governed choice of law. Kaiser v North, 292 Mich 49, 53; 289 NW2d 325 (1939). In 1987, fourteen years after Cray, this Court adopted the *lex fori* model of conflicts. Under this new doctrine, the law of the forum should be applied unless a comparative interest analysis reveals a rational reason to displace it. Olmstead v Anderson, 428 Mich 1, 3; 400 NW2d 292 (1987).

Since the 1973 conflict of laws doctrine did not consider the comparative interest of Michigan and the other potential jurisdiction, Cray’s public interests understandably separated the applicable law from an interest analysis.

The prevailing *lex fori* doctrine combined public interest factors b and c. Evaluation of the interests of “people concerned by the proceeding” will also establish which law will govern the case.

The MTLA accordingly supports a more precise definition of the first public interest factor and clarification that the third factor now reflects the comparative interest analysis of Michigan’s *lex fori* conflict of laws doctrine.

B. The Court should establish that the defendant has the burden of proving each of the three elements for a FNC dismissal, including that an alternative forum is available – that is, a forum that may exercise jurisdiction over the defendant, that permits litigation of the matter, and provides a remedy that is not clearly unsatisfactory.

Cray sets forth three requirements for a FNC dismissal:

1. An available alternative forum exists.
2. Demonstration, through the private and public interest factors, that the alternative forum is more appropriate for litigation of the claim; and
3. The filing of a timely motion.

Cray, supra, 389 Mich at 395-396.

“A plaintiff’s selection of a forum is ordinarily accorded deference.” Anderson v Great Lakes Dredge & Dock Co, 411 Mich 619, 628; 309 NW2d 539 (1981). “[U]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” Id., quoting Gulf Oil Corp v Gilbert, 330 US 501, 508; 67 S Ct 839; 91 L Ed 2d 1055 (1947). A trial court may not dismiss under FNC unless it finds that Michigan is a “seriously inconvenient” forum. Manfredi v Johnson Controls, Inc., 194 Mich App 519, 527; 487 NW2d 475 (1992), quoting Robey v Ford Motor Co, 155 Mich App 643, 645; 400 NW2d 610 (1986).⁴

It is universally established that the moving party has the burden of persuading the trial court that the case should be dismissed under FNC. See, e.g., Ford v Brown, 319 F3d 1302, 1311 (11th Cir 2003); In re Ford Motor Co, 344 F.3d 648, 652 (7th Cir 2003) Aguinda v Texaco, Inc., 303 F3d 470, 476 (2d Cir.2002); Iragorri v United Techs Corp, 274 F3d 65, 71 (2d Cir.2001) (*en banc*). This specifically includes the burden of

⁴ The MTLA responds to Defendant and its amici’s recommended changes regarding a non-US plaintiff’s choice of forum and the “seriously inconvenient” standard below.

demonstrating the existence of an adequate alternative forum. Satz v McDonnell Douglas Corp, 244 F3d 1279, 1282 (11th Cir 2001); BCCI v State Bank of Pakistan, 273 F3d 241, 248 (2d Cir 2000).

Though these burdens are unquestioned, this Court has never specifically articulated them. The MTLA therefore recommends that this Court definitively state that the defendant moving parties has the burden of establishing all the elements for a FNC dismissal.

This necessarily includes the burden of proving the existence of an available, alternative forum. On that issue, the MTLA is concerned that Defendant's stated definition of an available alternative forum is incomplete. According to Defendant, a forum is available only if the defendant is "amenable (sic) to process" in the other jurisdiction. (Defendant's brief, quoting Piper, supra, 454 US at 255 n 22). Actually, this is only part of the definition. In Piper, the US Supreme Court was clear that an alternative forum is available not just if the defendant is "amenable to process," but also if it permits "litigation of the subject matter of the dispute" and offers a remedy that is not "clearly unsatisfactory." Id. Any definition of an available alternative forum must include each of these three elements.

III. MICHIGAN SHOULD NOT ADOPT A RULE ACCORDING LESS DEFERENCE TO NON-US PLAINTIFFS' CHOICE OF FORUM THAN AFFORDED TO US CITIZENS.

Argument Summary

The MTLA opposes Defendant and its amici's request that the Supreme Court adopt the 4-3 majority holding in Piper, supra, and reduce the deference afforded a non-US plaintiff's choice of forum. As demonstrated above, any significant change in Michigan's FNC law is unnecessary. In addition, the Piper rule violates the limited

parameters of the FNC doctrine, has led to inconsistent, arbitrary and unfair results and offends notions of international comity. If this Court, nonetheless, adopts Piper, it should emphasize that the deference owed to a non-US plaintiff's choice of forum is only lessened, not eliminated.

A. **As a common law exception to a court's responsibility to decide cases jurisdictionally before it, FNC must remain a limited doctrine, applicable only in "extraordinary cases."**

To reiterate, this Court holds that a "plaintiff's selection of a forum is ordinarily accorded deference." Anderson, supra, 411 Mich 619, 628; 309 NW2d 539 (1981). Recognizing that FNC should apply only in "exceptional cases," Cray, 389 Mich at 392 (citation omitted), this Court has also cautioned that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed". Anderson, supra, quoting Gilbert, supra, 330 US at 508.

Cray and Anderson understand that FNC is a common law exception to a court's constitutional and statutory responsibility to exercise jurisdiction when established.⁵ "The concept at the heart of (FNC) – that courts have discretion to refuse to hear cases that fall squarely within their jurisdiction – clashes with a much more venerable principle, *judex tenetur impertiri judicium suum* (a court with jurisdiction over a case is bound to decide it)." Robertson and Speck, Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions, April, 1990 Texas L Rev 937, 949. Indeed, long before accepting the FNC doctrine, US Supreme Court Chief Justice John Marshall declared:

⁵ Given the parameters of this Court's June 10, 2005 order, this brief does not address Plaintiffs' argument that Michigan's FNC doctrine is an unconstitutional violation of the 1963 Constitution. The MTLA nonetheless supports and urges the Court to consider Plaintiffs' meritorious argument.

It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be [properly] brought before us. We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that which is not given. Cohens v Virginia, 19 US (6 Wheat) 264, 404 (1821) (emphasis added).

Whatever its genesis, the FNC was framed as a limited, extraordinary remedy. It was “designed as an instrument of justice to avoid the unfairness, harassment and oppressiveness of a trial away from the domicile of a defendant.” Cray, supra at 391-392 (citation omitted). Gilbert specifies that FNC should apply when there is evidence of “vexatiousness” or “harassment” of the defendant. Id., 330 US at 508. Federal cases required a particularly strong showing of vexatiousness, harassment or oppression “where defendant's economic capabilities are disproportionately greater than plaintiff's.” Reavis v Gulf Oil Corp, 85 FRD 666, 673 (DC Del 1980) (citation omitted).

Michigan's FNC doctrine, while equitably protecting defendants against geographically unfair litigation, remains consistent with the bedrock principle that a court may decline the exercise of properly laid jurisdiction only in exceptional cases. The Supreme Court should maintain FNC's limited scope and reject Defendant's urgings to significantly expand it.

B. Michigan should not adopt the ruling in Piper Aircraft Co v Reyno reducing the deference owed to a foreign plaintiff's choice of forum.

In Piper Aircraft Co v Reyno, 454 US 235; 102 S Ct 252; 70 L Ed 2d 419 (1981), the US Supreme Court substantially altered the federal FNC doctrine. By a slim 4-3 majority,⁶ the Court held that a plaintiff's choice of forum is entitled to “less deference” than an American plaintiff and applies with “less than maximum force.” Id. at 255, 256.

⁶ Justices Powell and O'Connor did not participate in the decision.

(Justices White, Brennan and Stevens dissented from the majority's reduction of the presumption owned a foreign plaintiff's choice of forum and from the holding that the district court properly dismissed under FNC). Piper also diluted Gilbert's pronouncement that FNC is designed to prevent vexatiousness and harassment. Instead of these goals, Piper repeatedly states that the FNC doctrine is intended to prevent inconvenience. Id at 255-256.⁷

Since this is not a preemption issue, Michigan is not obligated to follow Piper's statement of federal common law. Garg v Macomb County Community Mental Health Services, 472 Mich 263, 282; 696 NW2d 646 (2005). For several compelling reasons this Court should reject Defendant's request to adopt Piper.

Commentators have roundly criticized Piper's impact on federal FNC law. In the wake of Piper, many commentators have observed that the federal (FNC) doctrine has evolved from an "equitable, extraordinary remedy . . . by its nature a drastic remedy to be exercised . . . with caution and restraint' into a 'modern robust creature' at a time when technological advances have made litigation in a distant forum considerably easier." Clagett, Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of US Courts to Foreign Plaintiffs, 9 Tul Env'tl L J 513, 521 (Summer 1996) (citations omitted). In addition to general concerns over how Piper substantially broadened the FNC doctrine, commentators raise several specific objections.

1. Post-Piper decisions have been vague, amorphous and unprincipled.

In his Gilbert dissent, Justice Hugo Black wrote:

For any individual or corporate defendant who does part of his business in states other than the one in which he is sued will almost invariably be put

⁷ All seven sitting justices concurred in the view that a court could dismiss the case on grounds of FNC even if dismissal might lead to an unfavorable change in law. Id at 252.

to some inconvenience to defend himself. It will be a poorly represented multistate defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of action against him is most inconvenient. The Court's new rule will thus clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums. The preliminary disposition of this factual question will, I believe, produce the very kind of uncertainty, confusion, and hardship which stalled and handicapped persons seeking compensation for maritime injuries following this Court's decision in [Southern Pacific Co v Jensen, 244 US 205; 37 S Ct 524; 61 L Ed 1086 (1917)]. The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible. Id., 330 US at 515-516 (Black, J, dissenting).

Until Piper, the federal FNC doctrine remained generally true to its limitations. “The balancing scheme that the United States Supreme Court introduced in Gilbert and Koster⁸ gave courts a practical set of instructions to follow when considering a motion to dismiss under the common law doctrine of (FNC).” Mardirosian, Developments in the Law: Federal Jurisdiction and Forum Selection, Part VII Forum Non Conveniens, 37 Loy LA L Rev 1643, 1684-1685 (Summer 2004).

Since Piper, however, Justice Black’s predictions of uncertain and confusing decision have come true. Results of cases “are often varied and unpredictable.” Id., citing discussion in Reed, To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Stages, 29 Ga J Int’l & Comp L 31, 105 (2000). “As it stands now, (FNC) has become, as Justice Black predicted, a body of law that largely defies categorization, is difficult to predict, and clutters the steps to the courthouse door.” Waples, The Adequate Alternate Forum Analysis in Forum Non Conveniens: A Case for Reform, 36 Conn L Rev 1475, 1511 (Summer 2004). “The

⁸ Koster v Lumbermens Mutual Casualty Co, 330 US 518; 67 S Ct 828; 91 L Ed 1067 (1947).

‘unfettered judicial discretion’ that American courts use in determining (FNC) dismissals create a ‘crazy quilt of ad hoc, capricious and inconsistent decisions’ that leave plaintiffs with little guidance and often a result that is contrary to the underlying principles of the doctrine – justice and convenience.” Id., note 339, quoting Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U Pa L Rev 781, 785 (1985). The FNC rule lacks “principle.” Van Detta, The Irony of Instrumentalism: Using Dworkin’s Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Exemplified by Forum Non Conveniens Dismissals in International Product Liability Injury Cases, 87 Marq L Rev 425, 438 (Spring 2004).

To briefly illustrate, although Piper emphasizes that a foreign plaintiff’s choice of forum is entitled to reduced (but some) deference, many federal courts invoking FNC dismissals have refused “to afford the [foreign] plaintiff’s choice of forum any presumption of correctness at all.” Carney, International Forum Non Conveniens: § 1404.5 – A Proposal in the Interest of Sovereign Comity and Individual Justice, 45 Am U L Rev 415, 442 and n 153 (Dec 1995) (citations, including illustrative case citations, omitted). In turn, other cases hold FNC inapplicable and appear to grant foreign plaintiffs equal deference to US plaintiffs. See Lony v E.I. Du Pont de Nemours & Co, 935 F.2d 604 (3rd Cir 1991); Nieminen v Breeze-Eastern, 736 F Supp 580, 584 (D NJ 1990). Adoption of Piper will similarly erode the fabric of what is generally a stable area of Michigan law.

2. The Piper rule undermines international comity and unfairly protects resident MNCs from liability for tortious conduct.

Defendant and its amici’s claim that adoption of their recommendations will serve “comity” is patently misguided. At its heart, the Piper rule is “xenophobic”. Van Detta,

supra, 87 Marq L Rev at 495-496; Wilson, Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation, 65 Ohio St L J 659, 689 (2004), quoting Myers v Boeing Co, 794 P2d 1272, 1281 (Wash 1990).⁹ The rule discriminating against foreign plaintiffs is inconsistent with fairness, 786 SW2d 680-681, and is “out of step with international norms.” Waples, supra, 36 Conn L Rev at 1511. and n 245; Ismail, Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?, 11 BC Third World L J 249 (1990) (concluding that FNC is overly protective of US MNCs and should be abolished).

England and other common law jurisdictions are moving away from restrictive FNC standards. Id at n 245. Civil law jurisdictions do not even recognize FNC and “instead offer *lis pendens*, which stays a claim pending completion of parallel proceedings in another country.” Wilson, supra at 692 and n 172.

In sharp contrast to the jurisprudence of other nations, Piper’s discriminatory FNC doctrine “cuts against the notion that American courts have a role to play in transnational public law litigation.” Wilson, supra at 691. International concern over the parochialism of the American federal FNC doctrine has prompted a proposed Hague Conference amendment returning FNC to the Gilbert model. Id at 692-693. The proposal reaffirms that FNC applies only in “exceptional circumstances;” requires suspension of proceedings instead of dismissal; requires that the other jurisdiction be

⁹ According to Professor Van Detta, the claims that FNC must serve to protect American courts from a flood of foreign litigation in commentaries such as Boyce, Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno, 64 Tex L Rev 193 (1985), which MDTC repeatedly cites, is “xenophobic,” unsupported, and distorts scholarship by exploiting stereotypes of American lawyers. Van Detta, supra, 87 Marq L Rev at 495-496 and n 172.

“clearly more appropriate,” sets forth only private interest factors; and precludes “discrimination on the basis of the nationality or habitual residence of the parties.” Id.

Central to the perceived unfairness of Piper is that federal FNC law now shields US MNCs from liability for injuries sustained in foreign countries. Piper “has prompted continuing criticism for its often harsh effect on foreign plaintiffs, who are frequently denied the opportunity to use the US courts to hold US (MNCs) liable for their conduct abroad.” Carney, supra, 45 Am U L Rev at 418 (citations omitted).

Piper accomplishes this by not only reducing the deference owed to a non-US citizen’s choice of forum and eliminating “harassment” and “vexatiousness” as FNC principles, but by also openly sanctioning reverse forum shopping. Piper specifically states that the possibility that a defendant is using a motion to dismiss for reverse forum shopping “ordinarily should not enter into a trial court’s analysis of the private interests.” Id., 454 US at 252 n 19; see also Wilson, supra, 65 Ohio St L J at 662 (decrying practice of defendants using FNC motions as “reverse forum shopping”).

This has prompted cases like Dow Chemical Co v Castro Alfaro, 786 SW2d 684, 681 (Tex 1990) (Doggett, J, concurring), where one defendant corporation claimed that Texas was an inconvenient forum even though its headquarters was located only three blocks from the courthouse. In his landmark Castro Alfaro concurrence, which held FNC inapplicable in Texas,¹⁰ Justice Doggett bluntly characterized the prevailing FNC doctrine as “social engineering” effectuating a resident MNC’s “connivance to avoid corporate accountability.” Id. Justice Doggett added that the Piper-type FNC doctrine “has nothing to do with fairness and convenience and everything to do with immunizing

¹⁰ In 1993, the Texas Legislature passed a FNC statute. VTCA, Civil Practice & Remedies Code § 71.051.

multinational corporations from accountability for their alleged torts causing injury abroad.” Id at 680-681 (Doggett, J, concurring).

FNC dismissals of cases against MNCs “have torn the regulatory fabric by which MNCs are held accountable for safety of those to whom their activities pose risk . . .” Van Detta, supra at 430. The current FNC doctrine “is out of step with the broadening of the international canvas in which American courts must play a role in regulating American business activities that cause significant impact abroad . . .” Id at 430-431.

While elimination or reduction of the deference afforded a non-US plaintiff will serve the activist purpose of protecting MNCs, it is hardly consistent with notions of “comity” and “fairness.” This Court must reject Defendant and its amici’s attempt to cloak economic protectionism in the trappings of jurisprudential “comity.”

3. FNC dismissals usually deprive non-US plaintiffs of a remedy.

Defendant and its amici operate under the false premise that foreign plaintiffs “have many choices of fora against the local defendant” that would be “more appropriate.” (MDTC brief, p 8). They overlook the well established fact that international fora are almost never appropriate or adequate.

As commentators explain, the concept of an available alternative international forum is a “myth.” Van Detta, supra, 87 Marq L Rev at 503. Instead of leaving a cornucopia of fora “choices,” a FNC dismissal frequently tolls the “death knell for the case as a whole.” Waples, supra, 36 Conn L Rev 1476; Clagett, supra, 9 Tul Envtl L J at 531 and n 114 (“In reality . . . cases dismissed for (FNC) are rarely litigated in the ‘alternative’ forum.”); Carney, supra, 45 Am U L Rev at 421 (“dismissal for (FNC) under the federal common law approach often is tantamount to finding for the MNC, as foreign

plaintiffs are frequently without a remedy in their home forum”). Several examples demonstrate that so-called alternative foreign fora are rarely viable.

In Piper itself, the victims of the plane crash denied a US forum recovered nothing from the US defendants in subsequent litigation in Scotland. Pfander, Adding Insult to Overseas Injury: A failure of the Forum Non Doctrine, 93 Ill B J 314 (June 2005). Moreover, after the FNC dismissal in US litigation from the Bhopal disaster, which Defendant’s amici cites as an example for foreign forum shopping, the defendant corporation was able to delay paying any settlement for many years. Id. Finally, the settlement amounted to only \$15,000 per death and \$5,000 for severe disability. Id.

Moreover, a study of 85 other cases dismissed under FNC in the United States and England revealed that a mere four percent actually reach the alternative forum. Robertson, Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,” 103 L Q Rev 398, 409 (1987). Of these, only three resulted in a judgment in a foreign court. None were victories for the plaintiff. Of all the 85 cases, only a handful of plaintiffs received modest settlements. Id.

The concept of an alternate foreign forum is therefore a euphemism courts have “taken refuge in” to gloss “over the harsh fact that such dismissal is outcome determination in a high percentage of the (FNC) cases . . .” Mardirosian, supra, 37 Loy LA L Rev at 1684. It further instills the world view that, in addition to discriminating against foreign nationals, the Piper doctrine is transparent economic protectionism for American MNCs.

4. Some states and federal courts have rejected or departed from Piper.

While the majority of states addressing the issue follow Piper's reduction of the deference afforded to non-US plaintiffs' choice of forum, some have rejected or departed from it. Some federal courts have also mitigated the Piper rule.

In Myers v Boeing Co, 794 P.2d 1272 (Wash 1990), the Washington Supreme court refused to adopt Piper's reduced deference standard. At the outset, Myers noted that Piper's "persuasiveness is undermined . . . by the fact that the lesser deference standard holding was concurred in by only a 4-person majority." Id at 1280. Myers further explains that Piper's justification for reducing the deference owed to a foreign plaintiff's choice of forum "consists solely of a few conclusory sentences with no supportive analysis or reasoning." Id. Piper's justification was:

In [Koster, supra], the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. Piper, 454 US at 255-256 (footnote and citation omitted).

With those premises, Myers rejected Piper's reduced deference standard:

[Piper's] logic does not withstand scrutiny. The Court is comparing apples and oranges. Foreigners, by definition, can never choose the United States as their home forum. The Court purports to be giving lesser deference to the foreign plaintiffs' choice of forum when, in reality, it is giving lesser deference to *foreign plaintiffs*, based solely on their status as foreigners. More importantly, it is not necessarily less reasonable to assume that a foreign plaintiff's choice of forum is convenient. Why is it less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit? To take it one step further, why is it less reasonable to assume that a plaintiff, who is a Japanese citizen residing in Wenatchee, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit?

The Court's reference to the attractiveness of United States courts to foreigners, combined with a holding that, in application, gives less deference to foreign plaintiffs based on their status as foreigners, raises concerns about xenophobia. This alone should put us on guard.

Finally, we decline to adopt Piper because it simply is not necessary. Proper application of the Gilbert factors alone will lead to fair and equitable results. Under Gilbert, the decision whether or not to dismiss is, and will continue to be, based on the balancing of the factors as they relate to the plaintiff's choice of forum, not the plaintiff's status. This is as it should be. Furthermore, application of the Gilbert factors adequately protects against any perceived threat of foreign plaintiffs flooding United States courts. Granting foreign plaintiffs equal deference will not result in more foreign cases being heard here if the balance of private and public interest factors in those cases does not otherwise favor a United States forum. For example, Piper held that the District Court did not abuse its discretion in deciding that the private and public interest factors favored trial in Scotland. Thus, the result would have been the same without the application of the lesser deference standard. Id., 794 P2d at 1281 (original emphasis; citation omitted).

Myers' reasoning is compelling and directly supports rejection of Piper in Michigan. The Piper rule is unfair and xenophobic. Even more, as demonstrated, adoption of Piper "simply is not necessary." Proper application of the Cray factors alone has led to fair and equitable results – including from the defense standpoint. Myers is correct that "[g]ranteeing foreign plaintiffs equal deference will not result in more foreign cases being heard here if the balance of private and public interest factors in those cases does not otherwise favor a United States forum."

While no other state has yet to precisely follow Myers,¹¹ both Connecticut and Delaware have minimized the effect of the lesser deference by emphasizing that FNC dismissals are rare and that the defendant has the burden of proof. See Pickets v Int'l Playtex, Inc., 576 A2d 518, 524-525 (Conn 1990) ("Connecticut continues to have a

¹¹ In Dow Chemical Co v Castro Alfaro, 786 SW2d 684 (Tex 1990), the Texas Supreme Court rejected the entire FNC doctrine. Castro Alfaro stood until displaced by a FNC statute. (see note 8).

responsibility to those foreign plaintiffs who have properly invoked the jurisdiction of this forum”); Durkin v Intevac, Inc., 782 A2d 103, 109-12 (Conn 2001) (citing and applying Pickets, although affirming a FNC dismissal); Ison v E.I. Du Pont de Nemours & Co, Inc., 729 A2d 832, 842 (Del 1999) (aligning Delaware’s standard with Connecticut’s). Federal cases have also departed from Piper. See Lony v E.I. Du Pont de Nemours & Co, 935 F.2d 604 (3rd Cir 1991) (foreign plaintiff’s choice of forum should not automatically be denied full); Nieminen v Breeze-Eastern, 736 F Supp 580, 584 (D NJ 1990) (reluctance to grant foreign plaintiff full deference may be overcome by evidence that choice of forum is based on convenience).

The arbitrariness and xenophobia of Piper’s rationale, the narrowness of its holding, the lack of necessity for this change of law, and the inconsistent and unfair application of Piper by federal courts all necessitate that Michigan reject adoption of a rule reducing the deference afforded to a non-US citizen’s choice of forum.

C. If this Court adopts Piper, it should emphasize that a foreign plaintiff’s choice of forum is still accorded some deference and that FNC should apply only in “exceptional cases.”

Piper lessened, but did not eliminate the deference afforded to an international resident’s choice of forum. The Piper majority is clear that “a foreign plaintiff’s choice deserves less deference,” not no deference. Id., 454 US at 256.

While some federal cases have inconsistently deviated from Piper and held that a foreign plaintiff’s choice of forum deserves no deference, see Carney, supra, 45 Am U L Rev at n 153, most correctly recognize that a plaintiff’s foreign status is not dispositive:

This does not mean, however, that dismissal is ‘automatically barred’ when a plaintiff has chosen his home forum, nor that dismissal is automatically mandated when a foreign plaintiff is involved. Rather, ‘some

weight' must be given to the foreign plaintiff's forum choice, and 'this reduced weight is not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for (FNC) is the exception rather than the rule.' Cromer Fin Ltd v Berger, 158 F Supp 2d 347, 354 (SD NY 2001) (citation omitted).

"Less deference" under Piper is "not the same thing as no deference." Lueck v Sundstrand Corp, 236 F3d 1137, 1143 (9th Cir 2001), citing Ravelo Monegro v Rosa, 211 F3d 509, 514 (9th Cir 2000); Gschwind v Cessna Aircraft Co; 161 F.3d 602, 608 (10th Cir 1998) (foreign plaintiff's choice of forum still entitled to "some deference"); Murray v BBC, 81 F3d 287, 290 (2d Cir 1996) (less deference is not analogous to "no deference").

In that vein, federal courts continue to recognize that, in cases filed by non-US plaintiffs, FNC dismissal remains "the exception rather than the rule." Murray, supra (citation omitted); Slight By and Through Slight v E.I. DuPont De Nemours & Co, 979 F Supp 433, 437 (SD W Va 1997). Piper itself indicated that a foreign plaintiff's choice of forum is particularly entitled to less weight where he "is unable to offer any specific reasons of convenience supporting his choice." 454 US at 235. Where the defendant is a MNC and a resident of the forum state, and where the alleged tortious conduct occurred in the forum state, such as in the case at bar, a foreign plaintiff has "specific reasons of convenience supporting his choice." See Lony, supra; Nieminen, supra; Carney, supra, 45 Am U L Rev at n 154.

Accordingly, if this court adopts Piper, it should emphasize that the deference afforded the non-US plaintiff's choice of forum is only reduced, not eliminated. It should also reiterate the Michigan and federal rule that FNC remains applicable only in exceptional cases.

IV. **THE SUPREME COURT SHOULD NOT SIGNIFICANTLY ALTER CRAY'S PUBLIC INTEREST FACTORS AND SHOULD NOT INCLUDE CONSIDERATION OF THE EXTENT TO WHICH ACCOMMODATING THE INSTANT LAWSUIT WILL HAVE CONSEQUENCES FOR THE NUMBERS AND TYPES OF FUTURE LAWSUITS HEARD BY MICHIGAN COURTS.**

Argument Summary

Defendant and its amici unwisely call for elevated significance of Cray's public interest factors and inclusion of a factor permitting consideration of “the extent to which accommodating the instant lawsuit in Michigan will have consequences for the numbers and types of future lawsuits heard by Michigan courts.” For the reasons presented, significant changes in Michigan’s FNC law are not necessary. Moreover, because FNC is an extraordinary discretionary remedy, creating additional public interest factors will only increase the likelihood of arbitrary, inconsistent and unfair circuit court rulings. This includes adoption of a factor requiring a circuit court judge to predict how one lawsuit might affect the types and number of future cases.

A. **Significant modification of the public interest factors is unnecessary.**

As demonstrated in argument I, there is no reason to substantially modify Michigan’s FNC law.

B. **Adoption of additional public factors, including a factor requiring a trial court judge to predict the possible impact the present claim may have on the number and type of future Michigan cases, will likely spawn arbitrary, inconsistent and unfair rulings.**

Both Cray and Gilbert place consideration of their public interest factors after assessment of the private factors. Cray, supra, 389 Mich at 396; Gilbert, supra, 330 US at 508-509. This chronology inevitably renders the public interest factors secondary to a FNC analysis. Recognizing this, cases repeatedly hold that evaluation of the public

interest factors should resolve a FNC inquiry only if the trial judge finds that the balance of private interest is “in equipoise or near equipoise.” Nemariam v Federal Democratic Republic of Ethiopia, 315 F3d 390, 392-393 (DC Cir 2003), citing Pain v United Technologies Corp, 637 F2d 775, 784 (DC Cir 1980); La Seguridad v Transytur Line, 707 F2d 1304, 1307 (11th Cir 1983); Capri Trading Corp v Bank Bumiputra Malaysia Berhad, 812 F Supp 1041, 1045 (ND Cal 1993); In re Seatrain Lines, Inc. 32 BR 669, 671 (Bkrcty NY 1983); Kinney System, Inc v Continental Ins Co, 674 So2d 86, 90 (Fla 1996).

Commentators complain that post-Piper decisions have been arbitrary, inconsistent and unfair. (see argument III.B). A central criticism is that courts have used the public interest factors as “mere rationalizations” to reach desired results. Karayanni, The Myth and Reality of a Controversy: “Public Factors” and the Forum Non Conveniens Doctrine, 21 Wis Int’l L J 327, 352 (Spring 2003). Implicitly acknowledging that public factors encourage arbitrary and result-oriented results, “[i]n a recent judgment handed down by the House of Lords, Britain’s highest court unanimously held that a court dealing with the (FNC) doctrine should not taken into consideration factors of ‘public interest.’” Id at 327, citing Lubbe v Cape PLC, 4 All E R 268, 281-82, 286-87 (HL 2000). The presiding judge in Lubbe clearly stated that he “would . . . decline to follow those judges in the United States who would decline issues as to where a case ought to be tried on broad grounds of public policy.” Id at 287.

Neither Cray nor Gilbert intended the public interest factors to take prominence over the private factors. The MTLA is unaware of any case advocating elevation of the public interest factors over the private factors. Acceptance of Defendant’s suggestion to elevate the importance of the public interest factors will increase the likelihood of

arbitrary, inconsistent and unfair circuit court rulings. This is equally true of the proposed factor requiring consideration of how the present claim will increase the number and complexity of future cases.

Aside from Justice Markman's concurrence in Present, supra, the MTLA is unaware of any Michigan, federal or out of state case adopting this as a public factor. Even if this proposal had some traceable etiology, it should not be added to Michigan's public interest factors. Speculation about future case filings should not be a justification for a circuit court to grant or deny a FNC motion.

FNC is supposed to be a limited, non-jurisdictional doctrine. Application of the FNC doctrine therefore rests in the trial court's discretion. Cray, supra at 395.

The less fact-based and more policy-based a FNC ruling becomes, the less appropriate it is to apply an abuse of discretion standard of review. A circuit court judge must not be permitted to depart from the facts, dismiss a case based on his or her own politics, and then claim it was an appropriate exercise of discretion.

If there was some tangible evidence that Michigan is being inundated by internationally based lawsuits, Defendant's recommendations might warrant serious consideration. As it stands, however, Cray continues to adequately serve this state. This Court should not substantially change it.

- V. THE COURT SHOULD NOT ADOPT A “CATEGORICAL RULE” FAVORING OR REQUIRING FNC DISMISSALS IN CASES LIKE THIS. IF ANYTHING, FNC SHOULD PRESUMPTIVELY BE DENIED WHERE A DEFENDANT MNC RESIDES IN MICHIGAN, WHERE THE ALLEGED TORTIOUS CONDUCT OCCURRED IN THIS STATE, AND WHERE LIABILITY WITNESSES ARE LOCATED HERE.

Argument Summary

Defendant and its amici’s call for a “categorical rule” favoring or requiring FNC dismissals in cases filed by non-US plaintiffs against resident MNCs is totally devoid of merit. Promulgation of “categorical” rules would destroy the fact-based FNC doctrine and would necessitate repudiation of the abuse of discretion standard. If anything, FNC dismissals should be denied in cases, like the instant claim, where (1) the defendant is a resident MNC, (2) the alleged tortious conduct took place here, and (3) where most, if not all liability witnesses live in this state.

Defendant and its amici fail to cite a shred of authority supporting promulgation of a “categorical rule” favoring or requiring FNC dismissals in cases analogous to this. At its core, FNC is a “flexible” discretionary rule. Piper, supra, 454 US at 249-250. No single factor is dispositive. Id. FNC must apply on a “case by case” basis. Anderson, supra, 411 Mich at 627.

In Russell v Chrysler Corp, 43 Mich 617; 505 NW2d 263 (1993), this Court overruled Duyck v Int’l Playtex, Inc., 144 Mich App 595, 602-603; 375 NW2d 769 (1985) and Witt v CJ Barrymore’s, 195 Mich App 517, 520; 491 NW2d 871 (1992), which collectively stated the categorical rule that FNC is inapplicable if one of the parties is a Michigan resident. Russell was clear that, while “one factor,” residency does not control the FNC analysis. Id at 662 (citation omitted).

Russell demonstrates that “categorical rules” violate the FNC doctrine. They transform FNC into a jurisdictional doctrine, inconsistent with the abuse of discretion standard of review. Defendant’s proposal jurisprudentially offends the FNC doctrine.

Defendant’s proposal is also factually misplaced. While “categorically” overruled, Duyck and Witt illustrate the folly of a resident MNC arguing that Michigan is somehow an inconvenient forum. Defendant’s corporate headquarters is in Auburn Hills. Much of the alleged tortious conduct took place there.

In some jurisdictions, like California, “[i]f a corporation is the defendant, the state of its incorporation and the place where its principal place of business is located is presumptively a convenient forum. Stangvik v Shiley, Inc., 819 P2d 14 (Cal 1991). Furthermore, “where a (resident) corporation is actually carrying on business in the state and plaintiffs make an offer of proof concerning defendant’s in-state activities which supports the allegation that the tortious conduct occurred (here), the corporate connection with the state is more than tenuous and weighs against dismissal.” Corrigan v Bjork Shiley Corp., 227 Cal Rptr 247, 256 (Cal App 1986).

If anything, FNC should presumptively be denied when the defendant is a resident MNC, the alleged tortious conduct occurred in this state, and most, if not all liability witnesses live here. Corporate residence, coupled with a tangible connection between the controversy and forum, constitute grounds for denial of FNC. Id.; Nevader v Deyo, 489 NYS2d 420 (NY AD 1985) (FNC denied where defendant was resident of forum state and some tortious conduct occurred there); see also Lony, supra; Nieminen, supra; Carney, supra, 45 Am U L Rev at n 154. If this Court is interested in establishing categorical FNC rules, it should reinstate the holdings in Duyck and Witt and forever bar

arguments by MNCs like Defendant that the state of its principal place of business is inconvenient.

This is an unusual, fact-specific case. While the Plaintiffs are Croatian residents, most of the nonliability witnesses apparently speak English and are willing to travel to Michigan for trial. Documentation related to the accident has already been translated into English. In turn, all of the documents relating to liability are in English, and most, if not all of the liability witnesses live in Michigan.

The Court of Appeals reversed a FNC dismissal in this unique case does not herald an army of future internationally related cases. It also does not support Defendant's cry for a "categorical rule" protecting itself and other resident Michigan MNCs from suit in this state by international citizens.

VI. "SERIOUSLY INCONVENIENT" IS THE CORRECT STANDARD, FIRMLY ROOTED IN BOTH MICHIGAN AND NATIONAL LAW.

Argument Summary

Defendant and its amici mistakenly argue that the "seriously inconvenient" standard is merely a rhetorical anomaly that is inconsistent with Michigan and national law. This standard correctly states Restatement, FNC law. It is also consistent with the related doctrines for enforcement of both forum selection clauses and foreign judgments.

A. It is national, Restatement law that a state will decline to exercise jurisdiction only if it is "seriously inconvenient."

After Gilbert, the American Law Institute drafted its Restatement 2d Conflict of Laws. § 84 of this Restatement provides that "[a] state will not exercise jurisdiction if it is seriously inconvenient for the trial of the action provided that a more appropriate forum is available to the plaintiff."

In Cray, this Court specifically cited § 84's statement of the general FNC doctrine. Id., 389 Mich at 394 n 2. Cray further explains that, in the Restatement's commentary:

. . . the most important rules are said to be honoring plaintiff's choice except in unusual circumstances and never dismissing an action if there is no alternative forum. Alternate forums are the site of the incident, a corporation's state of incorporation or principal place of business and the state of plaintiff's domicile. Id.

A legion of national cases follow the "seriously inconvenient" standard. In addition to the cases cited in Plaintiff's brief, see Loannidis/Riga v M/V Sea Concert, 132 F Supp 2d 847, 861 (D Or 2001) ("seriously inconvenient" standard applies to FNC analysis with non-U.S. plaintiff); Warn v M/V Maridome, 961 F Supp 1357, 1374 (SD Cal 1997) ("if a forum is seriously inconvenient for a party and an alternative forum exists, the court may dismiss the action"); Ameritas Inv Corp v McKinney, 694 NW2d 191, 202 (Neb 2005) ("The doctrine of (FNC) (literally 'an unsuitable court') provides that a state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is provided to the plaintiff."); Medlantic Long Term Care Corp v Smith ex rel Estate of Ferguson, 791 A2d 25, 34 (DC 2002) (applies "seriously inconvenient" standard); Blake v Professional Travel Corp, 768 A2d 568, 574 (DC 2001) (citations omitted) (emphasizing that FNC public interest factors are applied "to avoid litigation in a seriously inconvenient forum, rather than to insure litigation in the most convenient forum"); Baypack Fisheries, LLC v Nelbro Packing Co., 992 P2d 1116, 1118-1119 (Alaska 1999) (citation omitted) (under FNC, "court should decline to exercise its jurisdiction only if the selected forum is a seriously inconvenient place to conduct litigation"); Betensky v Opcon Associates, Inc., 738 A2d 1171, 1176 (Conn Super 1999) (applied "seriously inconvenient" standard to case filed by non-U.S.

plaintiff); Lesser v Boughey, 965 P2d 802, 804 (Hawaii 1998) (applies standard); Alley v Parker, 707 A2d 77, 78-79 (Me 1998) (same); Anglim v Missouri Pacific RR Co, 832 SW2d 298, 302 (Mo banc 1992) (following “seriously inconvenient” standard); Missouri Pacific RR Co v Tircuit, 554 So2d 878, 881 (Miss 1989) (FNC applies only if chosen forum is “seriously inconvenient” to one or more parties and a more appropriate forum is available); Johnson v GD Searle & Co, 552 A2d 29, 30-31 (Md 1989) (same); Chambers v Merrell-Dow Pharmaceuticals, Inc, 519 NE2d 370 (Ohio 1988) (same standard); Carter v Netherton, 302 SW2d 382, 384 (Ky 1957). Australia’s FNC rule similarly applies only when forum “clearly inappropriate.” Karayanni, supra, 21 Wis Int’l L J at n 14.

The Court of Appeals holding that a trial court may not dismiss under FNC unless it finds that Michigan is a “seriously inconvenient” forum accurately reflects national FNC law. Manfredi, supra, 194 Mich App at 527, quoting Robey, supra, 155 Mich App at 645. It is consistent with Defendant’s burden of proof and Cray’s caution that FNC applies only in “exceptional cases.” Cray, supra, 389 Mich at 392 (citation omitted).

B. The “seriously inconvenient” rule is also consistent with doctrines relating to enforcement of both forum selection clauses and judgments.

MCL 600.745(3)(c) provides, among other factors, a forum selection clause is unenforceable if “[t]he other state would be a substantially less convenient place for the trial of the action than this state.” National law applies the “seriously inconvenient” standard to enforcement of forum selection clauses. See Bremen v Zapata Off-Shore Co, 407 US 1, 16; 92 S Ct 1907; 32 L Ed 2d 513 (1972) (in addition to other considerations, courts may refuse to enforce forum selection clause “if chosen forum is seriously inconvenient for the trial of the action”); Coastal Steel Corp v Tilghman

Wheelbrator Ltd, 709 F2d 190, 202 (3d Cir 1983); Security Watch, Inc v Sentinel Systems, Inc, 176 F3d 369, 375 (6th Cir 1999); Yamada Corp v Yasuda Fire and Marine Ins Co, Ltd, 712 NE2d 926, 930-934 (Ill App 1999) (among standards for determining whether forum selection clause is enforceable is whether “the chosen forum would be so seriously inconvenient for trial that the opposing party would be deprived of his or her day in court”).

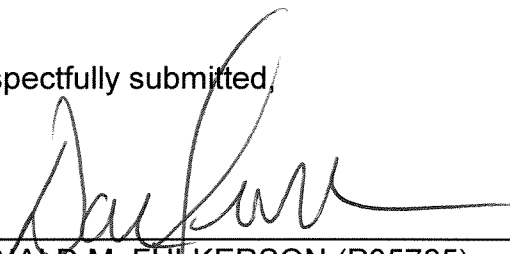
The standard for recognizing foreign judgment also includes the “seriously inconvenient” test. Michigan’s foreign judgment recognition statute, MCL 691.1154(1)(f), states, in pertinent part, that a “foreign judgment is not conclusive if . . . [i]n the case of jurisdiction based only on personal service, the foreign judgment was a seriously inconvenient forum for the trial of the action.” Like Michigan, national courts follow a “seriously inconvenient,” foreign judgment recognition rule. See Wimmer Canada, Inc v Abele Tractor & Equipment Co, Inc, 750 NYS2d 331, 334 (NY Super 2002) (foreign judgments enforceable unless defendant demonstrates forum was “seriously inconvenient” – analogous to FNC doctrine).

Defendant and its amici’s challenge to Michigan’s “seriously inconvenient” standard is therefore meritless. This rule accurately reflects national FNC law, and is consistent with the related doctrines of enforcement of forum selection clauses and enforcement of foreign judgments.

RELIEF REQUESTED

WHEREFORE, the Michigan Trial Lawyers Association respectfully requests this Honorable Court to affirm the Court of Appeals' decision, retain, with modest clarifications, the Cray public interest factors, decline to lessen the deference afforded non-US plaintiffs' choice of forum, decline Defendant's proposal to elevate and modify the public factors, and retain the standard that a trial should deny a FNC motion unless Michigan is a "seriously inconvenient" forum.

Respectfully submitted,



DONALD M. FULKERSON (P35785)
Attorney for Amicus Curiae
The Michigan Trial Lawyers Association
P.O. Box 85395
Westland, MI 48185
(734) 467-5620

Dated: November 4, 2005